IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.450 OF 2001

Mr. V.S. Jadhav ..Petitioner.

Vs.

Municipal Corporation of Greater Bombay & Ors. ..Respondents.

...

Mr. A.V. Bukhari with Mr. B.V. Bukhari i/b Mr. Umesh Nabar for the Petitioner.

Mrs. A.R. Joshi for the BMC.

WITH

WRIT PETITION NO.382 OF 2002

M.D. Sharma ..Petitioner.

Vs.

Municipal Corporation of Greater Mumbai ..Respondent.

....

Mr. V.S. Lonkar for the Petitioner.

Mrs. A.R. Joshi for the BMC.

....

CORAM : DR.D.Y.CHANDRACHUD, J.

3rd February, 2005.

ORAL JUDGMENT :

1. In both these Petitions under Article 226 of the Constitution, the action of the Commissioner of the Municipal Corporation in permanently withholding the pensionary payments of its two former employees who are the Petitioners before the Court has been called into question. In order to adjudicate upon the submissions which have been urged before the Court, a brief reference to the facts of the two Petitions would be appropriate:

2. In Writ Petition 450 of 2001 the Petitioner joined the service of the Municipal Corporation as an Overseer, a post which was subsequently designated as that of Assistant Engineer, in October 1963. In 1970, the Petitioner was promoted as a Sub-Engineer. In 1981, in pursuance of a selection which was carried out by the Maharashtra Public Service Commission (MPSC), he was appointed as a Ward Officer. In the year 1992, the

Petitioner came to be appointed as Deputy Municipal Commissioner again in pursuance of a selection carried out by the MPSC. The Petitioner retired on attaining the age of superannuation on 1st July, 1997. After his superannuation, a charge-sheet was issued to the Petitioner on 25th September, 1998 purportedly in exercise of powers conferred by Rule 14 of the Mumbai Municipal Corporation Pension Rules, 1953. Four articles of charge were framed against the Petitioner and briefly, the allegations against him were as follows :

i) In pursuance of a notice which was issued by the Corporation under Section 351 of the Mumbai Municipal Corporation Act, 1888 in respect of an unauthorized construction, the City Civil Court had directed the Deputy Municipal Commissioner to hear the noticee and pass orders. The Petitioner, it was alleged, passed an order in favour of the noticee, despite an earlier order of his predecessor dated 14th December, 1988, and inspite of the fact that an encroachment was made on a plot acquired by the Corporation which was reserved for the construction of a welfare centre.

ii) In pursuance of an application filed by an Ex-Municipal Councillor for the construction of a shed on an open plot owned by the Maharashtra Housing and Area Development Authority, the Petitioner had granted temporary permission for a period of 11 months in violation of the Development Control Rules;

iii) The Petitioner dropped certain proceedings which had been initiated on 5th February, 1993 under Section 351 of the Act in respect of the construction of an unauthorized mezzanine floor; and

iv) The Petitioner as a Ward Officer had put up a proposal on 20th February, 1987 upon which the Deputy Municipal Commissioner had agreed to drop the action which had been initiated in respect of the unauthorized construction of a loft at Ghatkopar (East).

3. The Petitioner submitted his reply on 5th October,1998 denying the charges and seeking the sanction of the competent authority to conduct a

departmental enquiry against him on retirement, a copy of the order of the competent authority appointing the enquiry officer, certified copies of the documents on which the charges had been framed and certified copies of the statements recorded of the witnesses. The enquiry proceeded ex parte. According to the Petitioner, he did not receive any of the intimations from the Municipal Corporation in respect of the enquiry, whereas according to the report of the enquiry officer intimations which were delivered by registered post were returned as not claimed. A show cause notice was issued to the Petitioner on 26th June, 2000 by the Additional Municipal Commissioner upon the report of the enquiry officer and after the reply dated 3rd August, 2000 was submitted by the Petitioner, the impugned order came to be passed on 15th January, 2001 by the Additional Municipal Commissioner withholding the entire pension that was liable to be paid to the Petitioner subject to the minimum admissible in the rules as a measure of punishment. This order has been challenged in the proceedings before the Court.

4. In Writ Petition 382 of 2002 the Petitioner was

appointed as a Sub-Engineer on 19th January, 1966 and was promoted as Assistant Engineer on 1st January, 1975. On 1st March, 1982 he was selected by the Maharashtra Public Service Commission to the post of Ward Officer and he came to be appointed to the post. He held the post between 1st August, 1992 and 20th September, 1993 as Ward Officer in the 'B' ward after which he was transferred. Some time in October 1993, a complaint was received from a Municipal Councillor in respect of certain bills which had been sanctioned to a municipal contractor. In April 1994, the Chief Officer (Enquiry) called upon the Petitioner to record his statement in a preliminary enquiry. The Petitioner retired from service on 1st August, 1997 and was sanctioned and paid his pensionary dues. A charge-sheet was issued to the Petitioner on 5th October, 1998 after his retirement. The charge against the Petitioner was in respect of events which had taken place in May and June 1993 when he was working as Ward Officer in the 'B' ward. The allegations against the Petitioner were :

i) That the Petitioner had failed to take cognizance of a memo received from a

Municipal Officer in 'B' ward in regard to the extent of encroachment in certain house gallis and while preparing the list of such house gallis for improvement work modified the list from 23 items of work to 40 items of work;

ii) The Petitioner had failed to visualize the quantum of work which was required to be carried out and he failed to make proper arrangement through his subordinates for the execution of the work proposed;

iii) The Petitioner failed to follow up the execution of the improvement work during the month of June 1993; and

iv) While forwarding the bills in respect of the improvement work which was carried out during June 1993, the Petitioner did not demand documents such as challans and photographs and he had merely relied on a certification which had been carried out by his subordinates.

5. The Petitioner did not participate in the enquiry. The enquiry officer submitted his report

on 27th January, 2000. On the said report, a notice to show cause was issued to the Petitioner on 26th July, 2000 by the Additional Municipal Commissioner. The Petitioner submitted his reply to the notice and on 15th October, 2001 an order of punishment was passed by the Municipal Commissioner under which the entire pensionary benefits have been withheld subject to the minimum admissible under the rules.

6. The submissions which have been urged in support of the two Petitions are substantially similar and these are as follows :

(i) As Deputy Municipal Commissioner in the first case and as Ward Officer in the second, the two Municipal officers were of a rank above the Executive Engineer within the meaning of Section 80-A of the Mumbai Municipal Corporation Act, 1888. Rule 5(1)(a) of the Pension Rules, 1953 defines the expression 'competent authority' to mean the Standing Committee in respect of Municipal servants, the power of appointing whom vests in the Standing Committee of the Corporation. There was no

authorization by the Standing Committee for the initiation of action and the Municipal Commissioner was therefore acting outside his jurisdiction in pursuing action for the withholding of pension under the Pension Rules;

(ii) The action which was initiated was in any event barred by limitation since within the meaning of Rule 14-B of the Pension Rules, 1953 the action was not initiated within a period of four years after the event which formed the subject matter of the enquiry.

In addition, in the first case it has been urged that the enquiry has been proceeded with ex parte; that the Petitioner had not received any intimation of the enquiry and that the facts and circumstances of the case would show that the Petitioner had no intimation of the enquiry. These submissions can now be considered.

7. Rule 14 of the Pension Rules, 1953 as it originally stood was in the following terms :

"14. Good conduct is an implied condition of

every grant of pension. The Competent authority may withhold or withdraw a pension or any part of it if the pensioner be convicted of a serious crime or be found to have been guilty of grave misconduct either during or after the completion of his service provided that before any order to this effect is issued, the Municipal Servant shall be given adequate opportunities of showing cause to the contrary."

8. Rule 14 as it stood was deleted with effect from 1st August, 1987 and came to be substituted by Rules 14-A and 14-B with effect from the same date. The resolution of the Corporation was confirmed by the government on 31st January, 2000 so as to give effect to the deletion and substitution with effect from 1st August, 1987. Rules 14-A and 14-B provide as follows :

"New Rule 14A

(1) Good conduct shall be an implied condition for every, grant of pension. Competent authority, may, by order in writing, withhold

or withdraw a pension or part thereof whether permanently or for specified period, if the pensioner is convicted of a serious crime or is found guilty of grave misconduct.

Provided that where a part of pension is withheld or withdrawn, the amount of remaining pension shall not be reduced below the minimum pension fixed.

2. Where a pensioner is convicted of a serious crime by Court of Law, action under Sub Rule (1) shall be taken in the light of the judgment of the Court relating to such conviction.

3. In a case not falling under sub Rule (2), if the competent authority considers, that the pensioner is prima facie guilty of grave misconduct, it shall, before passing an order under Sub Rule (1), follow the procedure laid down for conducting Departmental Enquiry for imposing punishment of reduction.

New Rule 14B

(1) Competent authority may, by order in writing, withhold or withdraw a pension or any part of it whether permanently or for specified period and also order the recovery from such pension, the whole or part of any pecuniary loss caused to the Corporation if, in any departmental or judicial proceedings, the pensioner is found guilty of grave misconduct or negligence during a period of his servive including service rendered upon re-employment after retirement. Provided that a part of pension is withheld or withdrawn the amount of remaining pension shall not be reduced below the minimum pension fixed.

(2)(a) The departmental proceedings referred to in Sub Rule (1) if instituted while the Municipal employee was in service whether before his retirement or during his re-employment, shall, after the final retirement of the Municipal employee, be deemed to be proceedings under this rule and shall be continued and concluded by the authority by which they were commenced in the same manner as if the Municipal employee had continued in

service.

(b) The departmental proceedings if not instituted while the Municipal employee was in service, whether before his retirement or during his re-employment --

i) shall not be instituted save with sanction of the competent authority.

ii) shall not be in respect of any event which took place more than 4 years before such institution, and

iii) shall be conducted by such authority and at such place as the Competent Authority may direct and in accordance with procedure applicable to the departmental proceedings in which an order of reduction could be made in relation to the Municipal employee during his service.

(3) No judicial proceeding, if not instituted while the Municipal employee was in service whether before his retirement or during his

re-employment shall be instituted in respect of a cause of action which arose or in respect of an event which took place more than 4 years before such institution.

(4) In the case of Municipal employee who has retired on attaining the age of superannuation or otherwise and against whom any departmental or judicial proceedings are instituted or where departmental proceedings are continued under Sub Rule (2), a provisional pension as provided in Rule 45A shall be sanctioned.

(5) Where competent authority decides not to withhold or withdraw pension but orders recovery of pecuniary loss from pension, the recovery shall not subject to the provision of Sub Rule (1) of this rule, ordinarily be made at the rate exceeding one third of the pension admissible on the date of retirement of a Municipal employee.

(6) For the purpose of the rule -

(a) Departmental proceedings shall be deemed to

be instituted on the date on which the statement of charges is issued to the Municipal employee or pensioner or if the Municipal employee has been placed under suspension from an earlier date, on such date, and

(b) Judicial proceedings shall be deemed to be instituted -

i) In the case of criminal proceedings, on the date on which the complaint or report of a Police Officer, of which the Magistrate takes cognisance is made, and

(ii) In the case of civil proceedings, on the date of presenting the plaint in the Court (Effect to Rule 14A & 14B is given from 1-8-1987)."

9. Now under Rule 14-A the competent authority is empowered to withhold or withdraw pension permanently or for a specified period if a pensioner is convicted of a serious crime or is found to be guilty of misconduct. If the

withholding or withdrawal of pension is due to the pensioner being guilty of grave misconduct, the Municipal Corporation has to follow the procedure which is laid down for conducting a departmental enquiry before it imposes a punishment of withholding pension. Under Rule 14-B the competent authority can withhold or withdraw pension and also order the recovery from the pensionary dues of the whole or any part of the pecuniary loss caused to the Corporation if, the pensioner is found guilty of grave misconduct or negligence during the period of service including service rendered upon re-employment after retirement. If departmental proceedings are initiated while the Municipal employee was in service, whether before his retirement or during the course of his re-employment, proceedings can be continued and concluded by the authority as if the employee has continued in service. Sub-rule (2)(b) deals with a situation where departmental proceedings were not instituted when the Municipal employee was in service. In that case three requirements have to be fulfilled before the employee can be proceeded with: (i) The proceedings cannot be instituted save with the sanction of the competent authority;

(ii) The proceedings shall not be in respect of any event which took place more than four years before the institution of those proceedings; and (iii) The proceedings have to be conducted by such authority and at such place as the competent authority may direct in accordance with the procedure applicable to a departmental proceeding. For the purposes of Rule 14-B the departmental proceedings are deemed to be instituted on the date on which a statement of charges is issued to the Municipal employee or the pensioner or if he has been placed under suspension at an earlier date on the date of suspension.

10. The power to initiate proceedings under Rule 14-A and 14-B is vested in the competent authority. Hence, it would be necessary to visit the definition of that expression in Rule 5(1)(a) of the Pension Rules, 1953 which is as follows :

> "5.(1) Unless there be anything repugnant in the subject or context, the terms defined in this rule are used in the rules in the sense here explained :-
>
> (a) 'Competent authority' means -

(i) The Standing Committee in respect of Municipal servants, the power of appointing whom vests in the Standing Committee or the Corporation;

and

(ii) The Municipal Commissioner for Greater Mumbai in respect of all other Municipal servants."

Thus, under Rule 5(1)(a) where the power of appointment vests in the Standing Committee or the Municipal Corporation, it is the Standing Committee which is defined to be the competent authority.

11. In considering the first submission which has been urged on behalf of the Petitioner, it would be necessary to advert to the provisions of Section 80A of the Mumbai Municipal Corporation Act, 1888 which provides as follows, in so far as is material:

"80A. Power of appointment in whom to vest.-(1) The power of appointing municipal officers, whether temporary or permanent, to the posts which rank equivalent to, or higher than, the post of Executive Engineer set forth in a schedule for the time being in force prepared and sanctioned under section 79, shall vest in the Corporation.

Provided that, temporary appointment to such posts for loan works may be made for a period of not more than six months by the Commissioner with the previous sanction of the Standing Committee; or in the case of works undertaken for the purpose of clause (q) of section 61, of the Education Committee; and the Commissioner shall, forthwith report every such appointment, when made, to the Corporation. No such appointment shall be renewed on the expiry of the said period of six months without the previous sanction of the Corporation.

(2) Save as otherwise provided in this Act, the power of appointing municipal officers and

servants whether temporary or permanent, shall vest in the Commissioner:"

12. Section 80-B deals with the manner of making appointments and under clause (a) of sub section (1) consultation with the MPSC is mandatory in the case of an appointment to a post, the power of appointment to which vests in the Corporation or the standing committee and which is equivalent to or higher than the post of Executive Engineer. Under Section 79 of the Act, the Municipal Commissioner is required from time to time to prepare and bring before the Standing Committee a schedule setting forth the designations and grades of officers and servants of the Municipal Corporation who should, in his opinion, be maintained, with salaries which are payable for these posts. In pursuance thereto, the Municipal Civil list is prepared under the authority of the Municipal Commissioner. At the material time, it is not disputed that the post of Ward Officer was mentioned in Item No.6 of the establishment of the Municipal Commissioner and carried a pay scale of Rs.2950 - 4200. The post of Executive Engineer was

mentioned at Sr. No.17 and carried the same pay scale. There is no dispute about the fact that subsequently the post of Ward Officer has been upgraded and has been made equivalent to that of a Deputy Chief Engineer. In so far as the Deputy Municipal Commissioner is concerned, it is undisputed that this post has at all material times been above the rank of Executive Engineer. That being the position, the power of appointment to both the posts of Ward Officer as well as Deputy Municipal Commissioner vests in the Corporation under Section 80A. Consequently, under Rule 5(1)(a) of the Pension Rules the competent authority would mean the Standing Committee. In both these cases at hand, it is undisputed that the Municipal Commissioner had not obtained the sanction of the Standing Committee either before initiating the proceedings or before imposing the penalty.

13. On behalf of the Municipal Corporation, however, it has been submitted in the affidavit in reply that a delegation had been effected by the Standing Committee of the Municipal Corporation, as a result whereof the Municipal Commissioner was

empowered to take action and it has been urged that since the powers of the Municipal Commissioner can be exercised by the Additional Municipal Commissioner, the impugned action could have been and was validly initiated. A copy of the alleged delegation of powers is annexed as Exh.2 to the reply filed by the Municipal Corporation. The delegation is recorded in a circular dated 13th March, 1980 of the Chief Accountant and in so far as is material it provides as follows :

> "Heads of Departments are informed that the S.C. and the Corporation under their above resolution have sanctioned, M.C.'s following proposals.
>
> (1) M.C. has been empowered to grant increase in temporary Pension under Rule 56 of the Pension Rules to Municipal Pension future from time to time at the rates at which State Government's sanction such increase to Govt. Pensioners.

(2) Power of sanctioning Pension Claims and Commutation claims has been delegated under Rule 5(1)(a) of the Pension Rules to the following officers:-

(i) Municipal Commissioner in respect of all the employees appointed by the Corporation, including Dy. Municipal Commissioners under his administrative control as well as in respect of Municipal Secretary and Municipal Chief Auditor."

14. Now a perusal of the aforesaid delegation shows that in Clause (2) thereof what is delegated to the Municipal Commissioner is the power of sanctioning pension claims and commutation claims under Rule 5(1)(a). The subject matter of delegation is the sanctioning of pension claims and commutation of claims. Ex facie, the document which has been relied upon by the Corporation shows that the power to sanction the initiation of disciplinary proceedings and the withholding or withdrawal of pension on disciplinary grounds is not delegated to the Municipal Commissioner. It

would appear from another circular dated 10th May, 1989 which is annexed as Exh.3 to the reply that there is a delegation in matters relating to the sanctioning and acceptance of requests for voluntary retirements and that delegation inter alia provides as follows:

> "(3) In cases where, as a result of adverse remarks or unsatisfactory performance, the amount of pension is to be reduced or where C.A. or Dy. C.A. is of the opinion that particular case of pension should be submitted to Dy. Municipal Commissioner, such cases should be submitted to the Dy. Municipal Commissioner for sanction."

This delegation, however, is ex facie applicable only in respect of those cases which deal with voluntary retirement. The position as it, therefore, emerges is that there was absolutely no warrant for the Municipal Commissioner and, as in the present case, the Additional Municipal Commissioner to initiate action or to impose a penalty of a permanent withdrawal of the pensionary benefits payable to the two employees in question

in the absence of the sanction of the Standing Committee which is the competent authority under Rule 5 (1)(a) of the Pension Rules, 1953. On this ground alone the Petitioners are entitled to succeed.

15. The second submission which has been urged in support of the Petitions is that the action which was initiated was beyond the period of limitation which is prescribed in Rule 14-B and must, therefore be quashed and set aside. Rule 14-B(2)(b)(ii) provides that if departmental proceedings are not instituted while the employee was in service, whether before his retirement or during the course of reemployment, they shall not be instituted in respect of an event which took place more than four years before such institution. Departmental proceedings are deemed to be instituted by sub rule 6(a) on the date on which a statement of charges is issued to a Municipal employee or from the date when the employee is placed under suspension if the suspension is from an earlier date.

16. In Writ Petition 450 of 2001 the charge sheet

was issued on 25th September, 1998 whereas in Writ Petition 382 of 2002 the charge sheet was issued on 5th October, 1998. The facts of Writ Petition 382 of 2002 can be considered first. In this case, ex facie the charge sheet dated 5th October, 1998 shows that the events which form the subject matter of the enquiry were when the employee was posted as a Ward Officer in 'B' Ward during the period 1st August, 1992 till 20th September, 1993. In fact the charges show that the misconduct is alleged to have taken place in the months of May and June 1993. Proceedings were initiated by the issuance of the charge sheet on 5th October, 1998. This was clearly beyond the period of four years that is prescribed under Rule 14-B.

17. Counsel appearing on behalf of the Municipal Corporation submitted that a preliminary enquiry was initiated when the employee was in service and the departmental enquiry which was pursued must be regarded as being in continuation of the preliminary enquiry. Hence, it was submitted that the period of four years must be reckoned from the conclusion of the preliminary enquiry and therefore, the action was within limitation. This

submission cannot be acceded to both in the face of the clear provisions of Rule 14-B(2)(b) as well as in view of judgments of the Supreme Court to which it would be necessary to advert shortly. Rule 14-B(2)(b), provides that the institution of departmental proceedings should not be in respect of an event which took place more than four years before the institution of the proceedings. The event which is referred to thereunder is the event of misconduct.

18. This interpretation is supported by the judgment of the Supreme Court in State of Bihar v. Mohd. Idris Ansari (1995 2 LLJ 705) in which a similar provision in the Bihar Pension Rules came up for consideration before a Bench of two Learned Judges. The Supreme Court upheld the order of the High Court setting aside departmental proceedings on the ground that they had been initiated more than four years after the date of the alleged misconduct. The Supreme Court observed thus :

> "A mere look at these provisions shows that before the power under Rule 43(b) can be exercised in connection with the alleged

misconduct of a retired Government servant, it must be shown that in departmental proceedings or judicial proceedings the concerned Government servant is found guilty of grave misconduct. This is also subject to the rider that such departmental proceedings shall have to be in respect of misconduct which took place not more than four years before the initiation of such proceedings. It is, therefore, apparent that no departmental proceedings could have been initiated in 1993 against the respondent under Rule 43(a) and (b), in connection with the alleged misconduct, as it is alleged to have taken place in the year 1986-87. As the alleged misconduct by 1993 was at least six years old, Rule 43(b) was out of picture." (emphasis supplied)

19. The same view has been taken in a subsequent decision of the Supreme Court in State of U.P. v. Shri Krishna Pandey ((1996) 9 SCC 395) where the provisions of Regulation 351-A of the Civil Services Regulations came up for consideration. The Supreme Court held as follows :

"On the other hand, the Regulation also would indicate that if the officer caused pecuniary loss or committed embezzlement etc. due to misconduct or negligence or dereliction of duty, then proceedings should also be instituted after retirement against the officer as expeditiously as possible. But the events of misconduct etc. which may have resulted in the loss to the Government or embezzlement, i.e., the cause for the institution of proceedings, should not have taken place more than four years before the date of institution of proceedings. In other words, the departmental proceedings must be instituted before lapse of four years from the date on which the event of misconduct etc. had taken place. Admittedly, in this case the officer had retired on 31-3-1987 and the proceedings were initiated on 21-4-1991. Obviously, the event of embezzlement which caused pecuniary loss to the State took place prior to four years from the date of his retirement. Under these circumstances, the State had disabled itself by their deliberate

> omissions to take appropriate action against the respondent and allowed the officer to escape from the provisions of Regulation 351-A of the Regulations." (emphasis supplied)

20. The same view had been taken by a Division Bench of this Court in P.M. Nadgauda v. State of Maharashtra (1988 Lab.I.C. 1198).

21. In the circumstances in so far as the Petitioner in Writ Petition 382 of 2002 is concerned, it is to my mind abundantly clear that the initiation of departmental proceedings took place more than four years after the event constituting the alleged misconduct and was therefore, without jurisdiction.

22. In so far as the facts in Writ Petition 450 of 2001 are concerned, the Municipal Corporation has filed its affidavit dated 26th July, 2001 in which it has been stated that in respect of four articles of charge, the cause of action accrued on 29th September, 1994, 7th May, 1994, 17th November, 1993 and 23rd February, 1987 respectively. Going by even the case of the Municipal Corporation it is

clear that atleast in respect of the last three articles of charge that the institution of the departmental proceedings on 25th September, 1998 was beyond the period of four years. In so far as the first article of charge is concerned, it has been stated that the cause of action accrued on 29th September, 1994. The aforesaid statement in the affidavit in reply, however, runs contrary to the statement of imputations annexed as Annexure II to the charge sheet in which it has been stated that the order that was passed by the Petitioner was in February, 1994. If the date February 1994 is taken as stated in the charge sheet, then the initiation of departmental proceedings was also beyond the period of four years.

23. In these circumstances, both these Petitions have to be allowed and are accordingly allowed. In Writ Petition 450 of 2001 the order passed by the Municipal Commissioner on 15th January, 2001 is quashed and set aside. In Writ Petition 382 of 2002 the order passed by the Municipal Commissioner on 15th October, 2001 is quashed and set aside. The Petitioners would be entitled to a refund of the amount on account of pension that may have been

wrongfully withheld by the Municipal Corporation. In Writ Petition 450 of 2001 Counsel states that in view of the interim order of stay that was granted in these proceedings, pensionary benefits have not been withheld. The Municipal Corporation shall take necessary steps in compliance with this judgment within a period of 12 weeks from today. The Petitions are accordingly allowed in the aforesaid terms.

Stay refused.